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**IN THE
COURT OF APPEALS OF INDIANA**

CHRISTINE PATRICK,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 49A04-0605-CR-267

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Richard Good, Judge
Cause No. 49G14-0310-FD-175185

May 17, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

In appealing her conviction for attempting to obtain a controlled substance by fraud or deceit, a class D felony, Christine Patrick makes a two-part challenge to the sufficiency of the evidence. First, she contends that the State did not present extrinsic evidence that Tussionex is a controlled substance. Second, she asserts that the State failed to prove she had the requisite mens rea. We affirm.

In reviewing sufficiency challenges, we “neither reweigh the evidence nor judge the credibility of witnesses.” *Sanders v. State*, 704 N.E.2d 119, 123 (Ind. 1999). Instead, we consider the evidence most favorable to the conviction and all reasonable inferences to be drawn therefrom. *See id.* If the evidence and inferences provide substantial evidence of probative value to support the conclusion of the trier of fact, then we will affirm. *See id.* The trier of fact is free to believe or disbelieve witnesses, as it sees fit. *McClendon v. State*, 671 N.E.2d 486, 488 (Ind. Ct. App. 1996).

The State charged Patrick with

knowingly acquir[ing] possession of a controlled substance, that is: tussionex pennkinetic, classified in Schedule III of the Indiana Uniform Controlled Substances Act, by misrepresentation, fraud, forgery, deception, . . . that is: by presenting to Curtis Bal[d]win, a registered pharmacist, a prescription form purported to have been issued by Dr. Bradley Weinberg, when said prescription form was not issued by said Dr. Bradley Weinberg, which conduct constituted a substantial step toward commission of . . . Obtaining a Controlled Substance by Fraud or Deceit[.]

Appellant’s App. at 17.

A person who “knowingly or intentionally acquires possession of a controlled substance by misrepresentation, fraud, forgery, deception, subterfuge, alteration of a

prescription order, concealment of a material fact, or use of a false name or false address commits a Class D felony.” Ind. Code § 35-48-4-14(c). A person attempts to commit a crime when, “acting with the culpability required for commission of the crime, he engages in conduct that constitutes a substantial step toward commission of the crime. An attempt to commit a crime is a felony or misdemeanor of the same class as the crime attempted.” Ind. Code § 35-41-5-1(a).

Controlled Substance

A conviction “will be reversed as a matter of law if the State fails to prove an essential element of the crime.” *Barnett v. State*, 579 N.E.2d 84, 86 (Ind. Ct. App. 1991).

With respect to offenses involving controlled substances, the State must prove, as an essential element, the proscribed drug falls within the applicable statutory provision. If a drug is identified in court by a name specifically designated as a controlled substance by the Indiana Code, then the State has proven as a matter of law the drug is a controlled substance. If the substance is not specifically enumerated by the Code as a controlled substance, the State must offer extrinsic evidence to prove the substance falls within the Code’s definition.

Id. (citations omitted).

Applied here, sufficient evidence had to be presented that Tussionex was a “controlled substance” – not that it was listed on a particular schedule. *See* Ind. Code § 35-48-4-14(c); *see also* Ind. Code § 35-48-1-9 (“‘Controlled substance’ means a drug, substance, or immediate precursor in schedule I, II, III, IV, or V”).¹ This is so despite the fact that the State included on the charging information, “Schedule III,” which here constituted

surplusage. Thus, while a drug's appearance on one of the schedules is often an easy way to prove the "controlled substance" element, it is not the only way. Indeed, where, as here, the drug is not enumerated on a schedule, "extrinsic evidence" that Tussionex actually is a controlled substance had to be provided in order to prove the controlled substance element of attempted obtainment of a controlled substance by fraud or deceit. *Barnett*, 579 N.E.2d at 86.

At trial, the State called Kroger pharmacy manager Curtis Baldwin, who had been presented with a prescription for 180 ML of Tussionex for a patient named "James Whitaker." He testified as to the various reasons he was immediately suspicious of the prescription, which had been dropped off by Patrick:

Well it appears to be a prescription written on a hospital blank sort of generic, where the doctor sort of customizes it with [h]is own name, his own signature. It's a very common sort of prescription blank starting point that a lot of hospitals use. It's from the Community Hospital system, which has at least three locations, I think four. These blanks [are] widely circulated easily obtainable and it is a point that the Indiana Board of Pharmacy emphasizes that we need to (as Pharmacists) need to scrutinize these types of blanks closely because they are often times misused, mishandled and often times forged. ...

Yes, several things and now we go to the often times misuse, just generically looking at that type of prescription, it causes me to give it extra scrutiny, because of what we've discussed with the Indiana State Board of Pharmacy. The second thing that occurred to me is *the ingredient the drug that's prescribed, because the drug itself is often times misused and forged itself and the drug in question is Tussionex*. ... *And also there is a cautionary advisory by the State Board of Pharmacy, to carefully scrutinize the quantity of often times abused drugs. This quantity is [a]n excessive amount, and so that sets*

¹ Incidentally, "controlled substance" has generally been defined as "[a]ny type of drug whose possession and use is regulated by law, including a narcotic, a stimulant, or a hallucinogen." BLACK'S LAW DICTIONARY 353 (8th ed. 2004).

off another sort of signal to my analysis to give it yet another degree of scrutiny.

....

The first of the additional things is the unit of this quantity [h]as been over written. It looks like the person wrote something and then wrote on it very strongly to obscure the background of the original pen or ink mark. Another thing, that occurs to me is the prescription is written in the since [sic] of the person who wrote this out as in writing not printing, but writing ... and the name of the patient and also the signature is written in a flowing script, but however the medicine Tussionex is printed very carefully. It does not match the flow of how a ... normal prescriber writes, in my experience writes a prescription down on a prescription blank.

Tr. at 11-17 (emphasis added). Baldwin further explained how an ampersand rather than the Latin “Q”² was used and then remarked that the doctor’s name had appeared on other fraudulent prescriptions. In addition, Baldwin noted that the “typical amount [of a Tussionex prescription] is 60ML, this one is for three times that amount.” *Id.* at 14. On cross-examination of Baldwin, the following colloquy occurred:

Q [by defense counsel]: But I’m saying that it would look ... it would sometimes you get prescriptions in two different handwritings ... that have two different handwritings on them?

A [Baldwin]: Infrequently, but yes.

Q. I ask that because my nurse will do that. *Sometimes a doctor may prescribe an unusual amount for certain reasons of a prescription, is that correct, very rare but some times?*

A. *Not a controlled substance, but [i]n ordinary substances like high blood pressure medicine they may in fact write as many as 365, meaning take one everyday for the entire year, but a controlled substance, no.*

Q. *So there’s never been ... You’ve never come across a time when they’ve prescribed an unusual amount especially when somebody is going on vacation or something like that?*

² Apparently, the Latin “Q” is often used on prescriptions to indicate a dosing schedule of “every twelve hours.” Tr. at 15.

A. *It's illegal to write a vacation supply on controlled substances, so the answer is no.*

Q. But at the time that you had ... The time that you saw this you just suspected that this was ... you suspected that his was fraudulent, correct before you call the ...

A. Not entirely. Let's say I was (by the presentation and by the testimony) I have given in my mind I was 99.9% sure, I did not just suspicion ... not even a strongly suspicion, let[']s just say within a hare's breath of being convinced.

Id. at 24-25 (emphasis added). In light of the above, we conclude that sufficient extrinsic evidence was presented to demonstrate that Tussionex falls within the Code's definition of a controlled substance.³

Mens Rea

"A person engages in conduct 'intentionally' if, when he engages in the conduct, it is his conscious objective to do so." Ind. Code § 35-41-2-2(a). "A person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so." Ind. Code § 35-41-2-2(b).

Intent is a mental function and, absent admission, it must be determined by courts and juries from a consideration of the defendant's conduct and the natural and usual consequences of such conduct. Because intent is a mental state, the trier of fact must usually resort to reasonable inferences based upon an examination of the surrounding circumstances to determine whether, from the person's conduct and the natural consequences that might be expected from that conduct, a showing or inference the intent to commit that conduct exists. For crimes of attempt, the State must prove the defendant, having the requisite intent, engaged in conduct constituting a substantial step toward commission of the crime.

Metzler v. State, 540 N.E.2d 606, 609 (Ind. 1989) (citations omitted).

³ That said, additional, easily ascertainable evidence could have eliminated this issue.

At trial, the evidence revealed that on October 8, 2003, Patrick dropped off “James Whitaker’s” prescription to be filled at the Kroger pharmacy on East 10th Street in Indianapolis. When asked at the pharmacy for Whitaker’s date of birth and phone number, Patrick was unable to supply either piece of information. In light of this and the other suspicious circumstances already outlined *supra*, Baldwin attempted to confirm the prescription with Dr. Weinberg’s office and then contacted police. A responding officer asked Patrick about the person whose name was on the prescription. “She was very vague about it, she was saying it was like her uncle or something like that, a family member.” Tr. at 31, 43. She “couldn’t tell [the officer] anything specific, such as where he lived, if he was waiting outside, if there was some way [the officer] could get in contact with him to verify her story.” *Id.* When informed that a police car could be sent “city wide ... if he [Whitaker] didn’t have a telephone to track him down,” Patrick offered “no way of contacting him.” *Id.* at 32.

Considering Patrick’s behavior and actions above, and the natural and usual consequences of such conduct, the court could easily infer that she knowingly or intentionally engaged in conduct that constituted a substantial step toward acquiring possession of a controlled substance by misrepresentation, fraud, forgery, etc. Specifically, Patrick arrived at a pharmacy with a prescription written out for someone else. The prescription was replete with red flags regarding its authenticity. When asked basic questions about the patient for whom she was picking up the controlled substance, Patrick claimed no knowledge. The State presented sufficient evidence of the appropriate mens rea as well as the other elements of attempted obtainment of a controlled substance by fraud or

deceit. To reach a different conclusion would be to reweigh evidence and judge credibility, tasks that we may not perform on appeal.

Affirmed.

BAKER, C. J., and FRIEDLANDER, J., concur.